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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1822~~ 70-278

DONALD C. GLOUNER, MURIEL J. GLOUNER, GARY D. GLOUNER, and PATRICIA ANN GLOUNER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* THE DEPARTMENT OF PUBLIC WORKS,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One.

RESPONDENT'S BRIEF IN OPPOSITION.

WILLIAM HOSMER PETERSON,
107 South Broadway,
Suite 9111,
Los Angeles, Calif. 90012,
Attorney for Respondent.

HARRY S. FENTON,
JOSEPH A. MONTOYA,
ROBERT W. VIDOR,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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RESPONDENT'S BRIEF IN OPPOSITION.

Respondent opposes the Petition for Writ of Certiorari on the ground that the decision of the Court of Appeal of the State of California, Second Appellate District, Division One, on the fair trial issue is correct and involves no basis for review by this Court.

Question Presented.

Respondent takes issue with each specification of the question presented on Page 3 of Petitioners' brief. This will be amplified in Respondent's Supplemental Statement of the case.

In particular, Respondent objects to the statement in subparagraph (b) that "The contempt holdings are unjustified, and conceded to be such . . .". Respondent might well ask, "conceded by whom?" The trial court did not deem the first citation of contempt unjustified, for in connection therewith it had prepared a proposed "Findings and Order Re Contempt."[1] Respondent, in its brief below, conceded only that the trial court's use of the word "nonsense" was ill advised and that counsel's request for an apology was "perhaps" not enough to make a contempt. As to the second incident, Respondent in its brief below stated that the trial court properly rebuked counsel for trying to usurp its power to rule on requests that a question be re-read.

Supplemental Statement of the Case.

As stated by Petitioners, this was a six-week eminent domain trial following a previous mistrial. Judging from the length of the transcript excerpts, the contempt incidents consumed in all perhaps five minutes in open court, before the jury.

Mr. Fadem, trial counsel for Petitioners, was cited four times, but never adjudged in contempt within the meaning of Section 1211, *California Code of Civil Procedure.*[2]

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[1]There is attached hereto as Appendix A the trial court's proposed "Findings and Order Re Contempt" which was included in the record below.

[2]Section 1211 CCP provides as to a direct contempt, "When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. . . ."

When the jury reconvened after the first incident, the trial court immediately admonished them as follows:

> ". . . Now, this morning, we had a certain issue of law that came up, and possibly in the heat of advocacy, counsel continued into his argument beyond what I thought was pertinent to the mere stating of that objection, and a matter that I felt should have been heard outside of the presence of the jury.
>
> Now, maybe I reacted too fast, too hastily. In fact, I, unfortunately, used the word 'nonsense' with reference to a matter that counsel referred to. In using that term, I was not referring to counsel's objection or to his testimony, but was referring to a legal matter that had been presented to a different department of this court at a time, oh, approximately a year or so ago. So I trust that because of our little disturbance here this morning you will not in any way be affected or prejudiced for or against the defendants Glouners in this case, and that we may proceed now with the remainder of the presentation of the testimony. . . ." [R.T. 1583:18-26, 1584:1-9.]

Three days after the second incident, Mr. Fadem filed a declaration to the effect that on March 4, 1968, the date of the triple citation, he had received an antitetanus shot and he "felt short tempered and unable to monitor [his] feelings with the effectiveness [he] normally maintains." [Cl. Tr. p. 682, lines 11-12.] Mr. Fadem also admitted feeling "flustered" that afternoon. [R.T. 2690:5-7.]

While Mr. Fadem was not permitted in summation to the jury to discuss the specific exchange of words be-

tween court and counsel giving rise to the citations, he was permitted full leeway in stating his lack of contumacious intent. As to the first citation, Mr. Fadem addressed the jury as follows:

> "I say to you I felt there was nothing that I said in those words to the witness [i.e. Mr. Fisher] that was a contempt of this Court. I say to you that I have a total and an abiding respect for the system of justice of our nation, and I take it very seriously each morning when the bailiff rises and says 'Face the flag which represents our constitution and freedom and justice for all', and I will talk more later about the role of that constitution in this kind of a case.
>
> "I say that those words that I just read, which led directly to the contempt within just a few lines, further were not intended by me to be a contempt because I feel no contempt, that I talk about this, you will recall, under the heading of this is the irrelevant, that which you must put aside. And I hope as earnestly as I can that you will follow the judge's instruction, and if there was anything that he did or said during this case which indicated where his sympathies or feelings lie, that those are to be disregarded.
>
> "Now back to some more irrelevancies." [R.T. 3038:9-26; 3039:1-2.]

Mr. Fadem's Petition for Writ of Review of the first incident was dismissed as moot, after a supplemental return informing the appellate court that the purported first order of contempt had been vacated and modified to show that Mr. Fadem was *cited* for contempt with further proceedings thereon continued. All the citations

were thus still pending for determination by the court after the jury had retired to deliberate on its verdict.[3]

The matters were finally heard in chambers and the court was persuaded by Mr. Graves to "vacate the previous orders and citation and contempt at this point, clear the record". [R.T. 3265:18-19; Cl. Tr. 685.] There was no request by either Mr. Fadem or Mr. Graves that the jury, which had not yet returned its verdict, be told of the ultimate disposition of the contempt citations.

The Contempt Citations, Being Trivial in Impact on the Jury and Non-Prejudicial in View of the Admonitions of the Court and Glouners' Counsel to Disregard Them, Did Not Deprive Petitioners of a Fair Trial.

Petitioners seize on the trial court's use of the words "teed off" during the hearing in chambers on the contempt citations. In context, the trial court was merely using the colloquialism for being provoked at Mr. Fadem's demand for an apology, which the court considered an unseemly request. In the portion of the record cited by petitioners [R.T. p. 3256], the trial court went on to explain:

> ". . . I might point out further that the court is an institution. It is not Lloyd Davis sitting up there on the bench. In other words, the Court is in no position to make an apology to any attorney, and for that reason, I think that the language that was used by Mr. Fadem exceeded that which was proper for an attorney, under the circumstances."

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[3]Under California procedure a direct contempt may be treated summarily or the court may reserve jurisdiction to act. *In re Grossman*, 109 Cal. App. 625, 631-632.

The brief exchanges between court and counsel in the case at bar are, of course, not in the same category as the vicious insults hurled at the trial judge in *Mayberry v. Pennsylvania* (1971); .... U.S. ...., 27 L. Ed. 2d 532, or the continuous wrangle between court and counsel in *Offutt v. U. S.* (1954), 348 U.S. 11. In said cases, this Court concluded that because of the court's manifest personal involvement, the trial court in a case of contempt by personal attack upon him should call in another judge to try the contempt.

No such extreme and aggravated incidents occurred in the case at bar such as to cause the court to give vent to personal spleen or respond to a personal grievance. (*Offutt, supra,* 348 U.S. at 14.) Insofar as heard by the jury, what happened in the case at bar was, in the language of this Court, in *Offutt* "a rare flare-up . . . a show of evanescent irritation, a modicum of quick temper that must be allowed even judges . . ." *Offutt, supra,* 348 U.S. at 17). Mr. Fadem was hardly subjected to the abusive comments of the trial judge quoted by this court in the margin of its decision in *Offutt* (348 U.S. at 16-17).

That the trial court was neither emotionally nor personally involved in the case at bar is manifest by the fact that it was persuaded to dismiss all the citations on the strength of Mr. Graves' analysis of the first incident as "a misunderstanding where tempers became a little bit touchy and frustration tolerance is lost a little bit and, in fact, an unfortunate incident occurred which is *best now forgotten*. . . ." [R.T. 3262:20-24; emphasis added.]

The second incident was also analyzed by Mr. Fadem's counsel in the context of the anti-tetanus shot,

and the trial court was persuaded to dismiss those citations on the premise that Mr. Fadem himself was prepared to apologize for that incident. [R.T. 3265:8-15.] As mentioned, the trial court dismissed all the citations without requiring any apology. Petitioners now assert that "the jury had no opportunity to learn that the trial judge vacated the spurious contempts" (Petition, p. 11.) Respondent submits that it ill behooves petitioners to make this contention since counsel failed to avail themselves of that opportunity in the trial court.

Petitioners further argue that the conduct of Mr. Fadem in the case at bar "was appropriate advocacy directed at proper representation of Petitioners" and that "on appeal Respondent conceded as much" (Petition, p. 11.) Respondent has canvassed its briefs in vain for such a broad concession. In fact, Respondent characterized the nub of the problem as Mr. Fadem's persistence in vindicating his position before the court and jury. In its answer to the petition for hearing in the Supreme Court, Respondent pointed out that during the exchanges Mr. Fadem was not even arguing rulings on the merits of the case nor protesting the trial court's invasion of the fact-finding province of the jury, and that Mr. Fadem was rather attempting to justify his method of cross-examination.

Petitioners further assert the prejudice was "obvious." But this Court, like the lower courts, does not presume prejudice. After the first episode, the jury was admonished to disregard it, and during the second incident, the court likewise made it clear that the matter was of no concern to the jury. Of course, it was not, for the State trial court had the power to protect the process of orderly trial and to punish violations thereof as a contempt. (Section 1211, *California Code of*

Civil Procedure; In re Hallinan, 71 Cal. 2d 1179, 1180; *cf.* 18 U.S.C. §401.)

Petitioners ask rhetorically why, if their counsel's conduct was "reprehensible", the trial court did not adjudge Mr. Fadem in contempt and permit the contempts to be reviewed. This contention amounts to second guessing and a change of strategy on appeal regarding the contempt matters. The thrust of Mr. Graves' handling at the trial level of the contempts was (1) that the first incident should be forgotten by Court and counsel as a mutual misunderstanding and as an inconsequential flare-up (as indeed the Court of Appeal characterized it), and (2) that Mr. Fadem, due to the physical after-effects of the anti-tetanus shot, might have been at fault in the second incident and, subject to an apology for that incident, the Court should dismiss all the citations. This, of course, was precisely what transpired, except that the trial court required no apology.

Conclusion.

Petitioners have magnified incidents which the decision of the California Court of Appeal properly characterized as "of trivial impact" on the jury—if indeed said incidents had any impact. The subsequent events befalling the trial judge have utterly no relevance to his conduct in the case at bar. The trial court's conduct during the incidents complained of fully measured up to this court's pronouncement in *Offutt* that a trial judge should not "give vent to personal spleen or respond to a personal grievance" (348 U.S. at 14).

In the language quoted by Petitioners from this court's decision in *Sacher v. United States* (1952) 343 U.S. 1, this Court also stated:

> ". . . But it will not equate contempt with courage or insults with independence. It will also protect the process of orderly trial, which is the supreme object of the lawyer's calling."
>
> *Sacher, supra,* 343 U.S. at 13-14.

Respondent submits that Petitioners have shown no reasons for granting the Writ of Certiorari and accordingly their petition should be denied.

Respectfully submitted,

WILLIAM HOSMER PETERSON,
Attorney for Respondent.

HARRY S. FENTON,
JOSEPH A. MONTOYA,
ROBERT W. VIDOR,
Of Counsel.

APPENDIX "A."

Findings and Order Re Contempt.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiffs, vs. Donald C. Glouner, et al., Defendants. No. 879 771.

The above entitled action came on regularly for trial on Friday, January 26, 1968, before the Honorable Lloyd S. Davis, Judge presiding. Before the selection of the jury, the Court carefully reviewed the voluminous file in this matter and conferred with counsel in chambers with reference to the issues to be determined. From this preliminary review, it appeared that this was an action in eminent domain, brought on behalf of the Department of Public Works to acquire easements over or fee title to certain relatively small portions of a larger parcel of property owned by the Glouner family. It also appeared that the proceedings had been filed on March 2, 1966. However, because of what appeared to be delaying and harrassing tactics on the part of the attorneys for the Glouners, the action had not been brought to trial until July 6, 1967. These delaying tactics included: the filing of an answer which did not comply with the requirements of Section 1246 C.C.P., even though defendant's counsel who were well experienced in the field of eminent domain were presumably well acquainted with the provisions of that section; the filing of proceedings to vacate the order of immediate possession, even though the right of immediate possession is granted by Section 14 of Art. I of the State Constitution, and the validity of this provision was uphold in the early case of *Marblehead Land*

Co. v. Superior Court, 62 C.A. 408; and the filing of non-responsive answers to Interrogatories propounded by the State. The file also indicated that there had been controversies in the Pretrial proceedings as to the comparability of the appraised reports submitted by the respective sides, and that no order was made for the exchange of the reports. However, a standard form embodying the provisions of the Superior Court's Eminent Domain Policy Memorandum was attached to the First Pre-trial Order. In its Minute Order at the time of the Final Pre-trial Conference, the Court ruled:

> "It is implicit in the Court's pretrial orders that although each party is bound by the study set forth in each report, such a study is necessarily subject to adjustment and amendment at time of trial upon determination of whether there is a single larger parcel or two separate larger parcels."

After some further proceedings respecting the number of challenges permitted the defendants under Section 170.6 C.C.P., the case was brought to trial on July 6, 1967, before the Honorable Jerold E. Weil. This trial terminated in an order declaring a mistrial on July 31, 1967. From the Minute Orders for each day of trial, an inference could be drawn that the trial had proceeded very slowly, with constant interruptions for argument on questions of law.

In order to avoid a repetition of the events that apparently had caused the mistrial at the first trial, counsel were advised that the Court intended to maintain a firm control over the proceedings, and would permit argument only where reasonably necessary and in such a manner as would not interfere with the orderly prog-

ress of the trial. In particular, counsel were advised that arguments of matters of law were not to be held in front of the jury, but were to be heard either in chambers or at the bench. As the trial proceeded, again at a very slow pace, this procedure of hearing arguments outside the presence of the jury was adhered to except in a few instances where it was felt that a discussion of the legal basis of a ruling could be of assistance to the jury.

Among the legal issues raised from time to time was the effect of the First Pretrial Order on the admissibility of testimony to be given by the expert witnesses. It was apparent that the expert witnesses could not be limited literally to the language used in the original appraisal reports, since the testimony had to be adapted to conform to the rulings of the Court with respect to the determination as to whether there was one larger parcel or two larger parcels, and as to what elements of detriment could be included in forming an opinion as to the amount of severance damages. It was felt by the Court that any discussion as to the effect of the Pretrial Order could be of no assistance to the jury and could well be prejudicial if it were brought out that the testimony of a witness differed from the position taken in the appraisal report, even though such a variance in the testimony resulted from rulings made by the Court. The Court therefore anticipated that it would be necessary to make a ruling expeditiously, if there was any suggestion of an attempt by counsel to make reference to the Pretrial Order before the jury.

On Monday, February 19, 1968, counsel for the Glouners, Jerrold A. Fadem, commenced his cross-examination of the State's first expert witness, George L. Fisher.

Mr. Fadem commenced a question by stating:

"Q. Would you look at your appraisal report, the copy that I have been handed, which bears the initials of the judge pro tem presiding at the pretrial conference, Richard Berry?"

The Court, believing that any reference to the pretrial proceedings was clearly irrelevant to any matter that could properly be presented to the jury and that such a reference could be prejudicial, stated:

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"Mr. Fadem, let's not interject unnecessary matters into your question."

Mr. Fadem, instead of proceeding with a proper question, commenced to argue back to the Court, stating in a loud and belligerent voice:

"I am only trying to identify. . . ."

The Court then again cautioned Mr. Fadem, stating:

"Now, we don't have to have that, Mr. Fadem."

Again, Mr. Fadem instead of proceeding with proper questioning of the witness, interjected:

"I don't understand what has troubled the Court, but I. . . ."

The Court then proceeded to admonish the jury, stating:

"The jury is instructed to disregard anything about what happened at the pretrial conference."

Again, instead of proceeding with a proper question to the witness, Mr. Fadem continued to argue with the Court, stating:

"I made no. . . ."

The Court, for the purpose of terminating this argument which was being conducted in front of the jury, stated:

> "You are not going to interject anything more of that nonsense."

The word "nonsense", as used by the Court was intended to refer to the pretrial proceedings which were quite irrelevant to the matters to be considered by the jury.

Mr. Fadem apparently misunderstood the Court's reference, stating again in a loud voice:

> "I object to your Honor's characterizing whatever I have done as nonsense. I think that that is detrimental to my position in this courtroom. It interferes with my effectiveness in the presentation of the case."

The Court again attempted to terminate the argument by stating:

> "You interjected, Mr. Fadem. Now let's just ask questions."

Instead of complying with the Court's direction, Mr. Fadem continued to argue, stating in front of the jury in a loud and belligerent tone of voice:

> "Your Honor's referring to my words as nonsense, I ask the Court's apology for. My words were not nonsense, and were appropriate to the subject of the question."

In order to finally terminate this unproductive argument, it was necessary for the Court to cite counsel for contempt, recess the jury forty minutes ahead of time for the noon recess, and leave the bench.

Even after the Court had left the bench, and while some of the jurors were still present, Mr. Fadem continued:

> "I have not been in contempt of court, your Honor. I would point out that as your Honor left the bench your face was red, your voice was rising, and you were shouting at me for no reason whatsoever."

FINDINGS

The Court finds:

1. That the statements made by Mr. Jerrold A. Fadem to the Court on Monday, February 19, 1968, as recited above, constituted disorderly, contemptuous and insolent behavior toward the Judge while holding court, and interrupted the due course of the trial. (Section 1209, Sub. 1, C.C.P.)

Hallinan v. Superior Court, 74 C.A. 420.

In re Grossman, 109 C.A. 625.

In re Hallinan, 126 C.A. 121.

Rose v. Superior Court, 140 C.A. 419.

Gillen v. Municipal Court, 37 C.A.2d 428.

2. That the failure of Mr. Jerrold A. Fadem to desist from argument of matters of law in front of the jury and to proceed with the questioning of the witness, constituted the disobedience of a lawful order of the Court. (Section 1209, Sub. 5, C.C.P.)

Hallinan v. Superior Court, 74 C.A. 427.

Cantillon v. Superior Court, 150 C.A.2d 184.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED by this Court, that the said Jerrold A. Fadem, by reason of said acts, conduct

and statements, was and is guilty of direct contempt of the authority of this Court, committed in its presence on the 19th of February, 1968.

IT IS FURTHER ORDERED that the said Jerrold A. Fadem be punished for said contempt and that he is hereby fined the sum of Twenty-five dollars, and that he pay said sum of Twenty-five dollars, plus Ten dollars, assessment under Section 13521 Penal Code, to the Clerk of this Court.

Dated this .... day of March, 1968.

.....

Judge of the Superior Court

[Cl. Tr. 804-810]